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719-160—64

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 698

WORZ, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND MID-FLORIDA TELEVISION CORP.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A) is reported at 323 F. 2d 618. Its order denying rehearing *en banc*, Judge Danaher concurring (Pet. App. 7A), is reported with the main opinion. The Report and Recommendation of the Federal Communications Commission is not officially reported. It is unofficially reported at 22 Pike & Fischer, Radio Regulation 125.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 1963 (Pet. App. 6A). A petition for rehearing *en banc* was denied on September 23, 1963 (Pet. App. 7A). The petition for a writ of certiorari was filed on Monday, December 23, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly affirmed the Commission's determination that Mid-Florida Television Corp., one of two applicants for a broadcast license, was not absolutely disqualified by reason of *ex parte* communications of its agent, which the Commission found were unknown to, and unratified by, it.

STATEMENT

In 1957, after a full comparative hearing, the Commission authorized Mid-Florida Television Corp. to construct a new television station on Channel 9 in Orlando, Florida, and denied the competing application of petitioner WORZ, Inc. (22 F.C.C. 1254). The decision was based upon comparative grounds and neither applicant was disqualified. Upon appeal by WORZ, the court of appeals affirmed *per curiam* (257 F. 2d 199), and WORZ filed a petition for a writ of certiorari. In a brief in opposition, the Solicitor General and Commission counsel pointed out that testimony given before the Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce, subsequent to the

decision of the court of appeals, indicated that *ex parte* presentations had been made to a member of the Commission during the comparative hearing by a person who had represented Mid-Florida in a Florida legal matter. The brief in opposition advised the Court that the Commission had instituted an inquiry and that a denial of certiorari would not be considered as foreclosing future action by the Commission.

In reliance upon these representations, the Court granted certiorari, vacated the judgment of the court of appeals, and remanded the case for appropriate action (358 U.S. 55). On remand, the court of appeals vacated the Commission's order and remanded the case for hearing before a specially appointed hearing examiner to inquire into all *ex parte* contacts. The court retained jurisdiction pending its further order (268 F. 2d 889).

1. PROCEEDINGS BEFORE THE COMMISSION

The Commission thereupon reopened the record for further hearing upon the following issues (R. 2618–2619):[1]

> 1. To determine whether any of the members of the Commission who participated in the proceedings before the Commission which resulted in the award of a construction permit for a television station on Channel 9 in Orlando, Florida, should be disqualified from participating in the reopened proceedings.

[1] References to "R. —" are to the original record filed with the court below. References to "J. App. —" are to the printed joint appendix below.

2. To determine whether any person or persons influenced or attempted to influence any member of the Commission with respect to the proceedings * * * in any manner whatsoever except by the recognized and public processes of adjudication.

3. To determine whether any party to the proceedings * * * directly or indirectly secured, aided, confirmed, ratified, or knew of any misconduct or improprieties in connection with the proceedings.

4. To determine in the light of the facts adduced upon the foregoing issues, whether any of the applicants in this proceeding should be disqualified from receiving a grant of its application; and whether the conduct of any applicant, if not a disqualifying character, has been such as to reflect adversely upon such applicant from a comparative standpoint.

On September 19, 1961, after a full hearing, the special examiner issued an Initial Decision (J. App. 18-32) in which he concluded that Mid-Florida was disqualified from receiving a grant of its application because it had been aware of, and had ratified, improper *ex parte* representations by an attorney, William H. Dial, to former Commissioner Mack during the comparative hearing. The examiner ruled that the original proceeding was void. He also found that no other Commissioner had received any *ex parte* representations; and that none of the principals of WORZ had attempted any misconduct of that nature (J. App. 31).

On January 8, 1963, the Commission (J. App. 32–41) reversed the examiner's conclusion that the principals of Mid-Florida had knowledge of and ratified the *ex parte* representations to Commissioner Mack, and held that "nothing revealed in the instant proceeding can be held to detract from Mid-Florida's qualifications as a licensee" (J. App. 39). The Commission agreed with the examiner's conclusions that Dial's contacts with Mack were improper, and that, as a result, the original proceeding was void (J. App. 38–39). It also agreed that no present member of the Commission was disqualified from participating in the reopened proceeding (J. App. 39). The Commission recommended that the court of appeals remand the case to the Commission for a new decision on the comparative qualifications of the applicants on the basis of the existing record but after further oral argument (J. App. 40).[2]

Dissenting in part (J. App. 41–45), Chairman Minow expressed the view that while the record did not require Mid-Florida's disqualification, it did significantly impair Mid-Florida's comparative standing as an applicant. Observing further that serious questions also existed concerning the character of WORZ's principals, the Chairman recommended that the court authorize the Commission to decide, after

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[2] The Commission directed its General Counsel to transmit its Report and Recommendation to the court of appeals (J. App. 40).

a new oral argument, whether to grant one of the existing applications or to reopen the record for new applications (J. App. 42, note 1).[3]

2. THE COURT OF APPEALS DECISION

The court of appeals accepted the Commission's findings that the principals of Mid-Florida had not been aware of Dial's conduct, and its conclusion that Mid-Florida was not disqualified (Pet. App. 5A). It held, however, in accord with Chairman Minow's position, that the Commission should decide, after new oral argument, whether to grant one of the existing applications or to reopen the record for new applications (Pet. App. 5A). In arriving at its decision on all matters including the reopening, the court directed that the Commission (Pet. App. 5A)—

> shall consider the serious question concerning the character of WORZ's principals. It shall also consider the weight to be given to the Roth incident at a time when Roth was secretary of Mid-Florida and a stock subscriber in the corporation,[4] as well as the fact that, although the Commission has concluded Mid-Florida's

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[3] Commissioners Craven and Henry did not participate in any of the proceedings.

[4] In its original decision (22 F.C.C. 1254) granting the application of Mid-Florida, the Commission found that the stockholders of WORZ had attempted to conceal material facts concerning the interest of one William O. Murrell, Sr., in the proposed television station and an existing radio station which they controlled, and that one Hyman N. Roth, a secretary and director of Mid-Florida, had sent a letter to the Commission concerning the pendency of disbarment proceedings against Murrell in the name of the secretary *of the local bar association*, in which he concealed his authorship of the letter.

pri. cipals were not aware of their attorney's ex parte communications with former Commissioner Mack, even so such communications were in fact made by Mid-Florida's attorney.

The court of appeals subsequently denied WORZ's petition for rehearing *en banc*.[5]

ARGUMENT

1. The decision of the court of appeals is clearly interlocutory. Its interlocutory character, as shown by the remand for a comparative proceeding, is emphasized by the court's intimation that the record may now be so stale that the Commission may wish to entertain new applications. The Commission has been directed to consider the conduct of both applicants. No broadcast license will be issued until the completion of these further administrative proceedings and any judicial error now complained of, which might hypothetically diminish petitioner's chances to obtain the license, may not survive. Indeed, the full meaning of the court's decision cannot be appreciated until it is brought to bear in the comparative proceedings. Thus, review at the present time seems plainly inappropriate. See *Land* v. *Dollar*, 330 U.S. 731, 734.

There is no conflict between the decision below and *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. 2d 514 (C.A. 3), cited by petitioner as establishing a rule of absolute disqualification. There, the principals themselves were found to have engaged in an "illicit combination * * * to obstruct justice" in a

[5] In a concurring statement, Circuit Judge Danaher explained his interpretation of the court's directions on remand (Pet. App. 7A-2).

patent infringement case (*id.* at 534). Nor is this case like *WKAT, Inc.* v. *Federal Communications Commission*, 296 F. 2d 375 (C.A. D.C.), certiorari denied, 368 U.S. 841, where the Commission, following *Root*, disqualified three applicants who had attempted to win the case by off-the-record presentations. Indeed, the standard applied by the Commission in this case was suggested by the court's remand instructions in the first *WKAT* case (258 F. 2d at 420) in which it directed that findings be made as to—

> whether any party to the proceeding before the Commission directly or indirectly secured, aided, confirmed, ratified, or knew of any misconduct found by the Commission to have occurred * * *.

Here, the Commission found that Mid-Florida was not aware of, and did not ratify, Dial's *ex parte* contacts. Accordingly, its disqualification was not required by the rule established in *WKAT* (296 F. 2d 375) and *Root*. On the other hand, the court's remand instructions direct the Commission "in arriving at its decision on all matters, including the question of reopening" to consider the fact that such communications were in fact made by Mid-Florida's attorney, albeit without the company's knowledge. (Statement, *supra*, pp. 6–7). Judge Danaher, explaining these instructions, indicated that the Commission must still determine whether "Mid-Florida should be permitted to receive and retain the benefits, without being accorded the detriment, of the miscon-

duct of its agents."[6] We take no position on this issue now, except to point out that its presence in the forthcoming comparative proceedings emphasizes the interlocutory nature of the decision below. In addition, the court's instructions are a complete answer to petitioner's argument (Pet. 21–22) that the court (as well as the Commission) erred in failing to charge Mid-Florida with the consequences of the misconduct of its attorney.

2. Petitioner also attacks (Pet. 22–25) the Commission's evaluation of the evidence and its finding that Mid-Florida's principals had no knowledge of the wrongful actions of the attorney Dial. The Commission accepted the testimony of Dial and of Mid-Florida's principals to that effect. It was acting within permissible limits when it reversed the hearing examiner, and the court's affirmance of this decision is correct. See *Federal Communications Commission* v. *Allentown Broadcasting Co.*, 349 U.S. 358, 364.[7] In any event, such questions of the substantiality of the evidence supporting an agency's order are for the court of appeals. *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 401.

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[6] Judge Danaher concurring in the order denying WORZ's petition for rehearing *en banc* (Pet. 7A, p. 4).

[7] Petitioner (Pet. 19–20) also refers to the Commission's evaluation of the evidence before it in 1957, when it held that WORZ had failed to disclose the true parties in interest and that these parties had not behaved with candor. Since this action of the Commission was taken when passing upon the license application the first time and the award of the license has been set aside by the court of appeals, this argument is not pertinent to the present reopened proceeding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964